Supreme Court, U.S.
FILED
JUL 17 2004

No. 04-109

IN THE

SUPREME COURT OF THE UNITED STATES

TRICITY BEHAVIORAL HEALTH SERVICES, INC.,

PETITIONER,

V.

ARIZONA DEPARTMENT OF HEALTH SERVICES ARIZONA; ARIZONA HEALTH CARE COST CONTAINMENT SYSTEM ADMINISTRATION; AND ANTHONY D. RODGERS IN HIS OFFICIAL CAPACITY AS THE DIRECTOR OF THE ARIZONA HEALTH CARE COST CONTAINMENT SYSTEM,

RESPONDENTS.

On Petition for Writ of Certiorari
To The Supreme Court of Arizona

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Are the "time bar" provisions applicable in this case which involves "aged" receivables and seasonal proof that those receivable have become bad debts?

2. Does collateral estoppel prevent TriCity from making its argument against AHCCCS when AHCCCS declares itself a "nominal party" was not before the Court and these was no opportunity to litigate the issue of their equitable estoppel?

3. Were the elements of equitable estoppel satisfied as to ADHS?

4. Were the elements of equitable estoppel satisfied as to AHCCCS through the December 30, 1998 letter of Mr. Branch McNeal, the Assistant to the Director of AHCCCS?

LIST OF ALL PARTIES AND CORPORATE DISCLOSURE STATEMENT

Parties:

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Corporate Disclosure Statement

TriCity Behavioral Services, Inc., is a non-profit corporation formed under the laws of Arizona. It declared bankruptcy, and is presently managed by a court appointed receiver, who has become its new Chief Executive Officer. There are no 10% or greater equity owners or managers pertaining to TriCity.

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- Maricopa County Superior Court (Appendix Item I) Judge Bolton's Order
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- AZ Court of Appeals Opinion (Appendix Item IV)
- AZ Supreme Court Opinion (Appendix Item V)

STATEMENT OF BASIS FOR JURISDICTION

i) date of judgement entered
April 19, 2004 Petition for Review
Denied in Arizona Supreme Court

ii) No Request for Rehearing was Required

iii) Rule 12.5 is applicable

iv) Supreme Court of the Unites States:
Rule 13 Provisions Conferring Jurisdiction

v) Issues of Constitutionality Not Involved

STATEMENT OF THE CASE

TriCity is a non-profit healthcare provider to the homeless and indigent. TriCity operated a Community Mental Health Center ("CMHC") program that provided intensive, outpatient mental health services to seriously mentally ill patients. This appeal concerns reimbursement for services provided to those seriously mentally ill during the time frame of 1996-1999. Approximately 99% of TriCity's CMHC patients are eligible for Medicare. Arizona is an "exception state" and does not provide Medicaid, but does provide benefits through its alternative plan, Arizona Health Care Cost Containment System or "AHCCCS". "TriCity's CMHC patients also qualify for AHCCCS and meet the AHCCCS definition of "seriously mentally ill." The services provided by TriCity are not AHCCCS covered services. They are covered by Medicare. Pursuant to Medicare regulations and the Arizona State Plan for AHCCCS, when these indigent patients fail to pay their Medicare coinsurance and deductibles ("CIDs"), and after there have then been reasonable collection efforts, AHCCCS or the contractor who provides the mental health services for AHCCCS is responsible for reimbursing the provider for the unpaid CIDs. AHCCCS' responsibility to pay for these CIDs for Medicare services arises out of the cost-sharing obligations applicable to AHCCCS and Medicare. These coinsurance and deductible amounts of $1,055,374.00 are what is at issue in this action, although the amount itself is not at issue.

The procedural history of this grievance and appeal is somewhat unique because although TriCity repeatedly tried to submit these claims to ComCare, the apparent AHCCCS program contractor responsible for mental health services in TriCity's area. ComCare refused to ever process or even accept the claims. Therefore, TriCity never received a formal denial of the claims from which to grieve to the AHCCCS administration. At the same time, ComCare and AHCCCS kept assuring TriCity that it would be reimbursed for its CID claims. In June of 1998, with no agency taking responsibility for the claims, TriCity filed a lawsuit in Federal District

Court, alleging futility in exhausting administrative remedies. The lawsuit was filed against Blue Cross, AHCCCS, ADHS and ComCare, all of whom appeared, examined the claims and filed a joint Motion to Dismiss. Judge Rosenblatt issued a temporary restraining order and then met with the parties before he ruled on the Motion to Dismiss. He advised all present that he "did not want to see this matter in court again", stating " someone in this room is responsible." ADHS and AHCCCS were present with client representatives and counsel when these statements were made. Judge Rosenblatt did later rule on the Motion to Dismiss the case, stating that TriCity was obligated to exhaust its administrative remedies. Blue Cross heeded the Judge's warning and settled the Medicare portion of the CID. Immediately thereafter, on August 4, 1998 TriCity submitted a Grievance and Notice of Appeal to ComCare. Because TriCity had still not yet been allowed to submit these claims and therefore had not yet received a denial on a single claim, the grievance was based on ComCare's refusal to accept or process reimbursement claims for services provided by TriCity during fiscal years 1996, 1997, and 1998.

ComCare requested and received several extensions of time in which to respond to TriCity's grievance letter. Finally, on November 25, 1998, TriCity was forced to file a formal Notice of Appeal and Request for Hearing pursuant to A.R.S. §§ 36-3413 and 41-1061 and Arizona Administrative Code § R-9-22-804, based on ComCare's failure or refusal to investigate and decide the grievance in a timely manner.

An evidentiary hearing was held on March 17 and 18, 1999 before an AHCCCS Hearing Officer. On June 25, 1999, the AHCCCS Director issued her Decision adopting the Findings of Fact, Conclusions of Law, and Recommended Decision of the Hearing Officer almost in its entirety. TriCity and ComCare both timely appealed from that Decision. The appeals were consolidated and heard by then Superior Court Judge Susan Bolton.

As the same scenario of inter-agency finger-pointing played itself out in Superior Court, counsel for TriCity attempted numerous times and on many occasions to obtain the contracts that were being relied upon in defense of ComCare and the contracts related to AHCCCS from their respective counsel: Mr. Don Skypeck and Mr. Logan Johnston. The documents were never delivered until their absence came to the attention of Judge Bolton. It should be noted that counsel for these agencies delayed producing the contracts, then claimed they couldn't find the documents or the RFP's they responded to, or that none of it mattered because it was all irrelevant anyway. Judge Bolton had to resort to ordering the production of the contracts and RFP's (See Appendix Item I.). It was then that the responsibilities of the governmental agencies began to come to light.

Judge Bolton determined that, contrary to what all parties had thought, responsibility for the payments was not ComCare's. TriCity attempted to persuade the Court to treat AHCCCS as properly before the court, but AHCCCS had appeared as a nominal party. The Judge felt she lacked "party jurisdiction" over AHCCCS and sent the case to the agency with this admonition:

> The Court finds AHCCCS position in the motion to dismiss to be somewhat disingenuous, AHCCCS has concluded that it is responsible for these co-insurance and deductibles and that the responsibility had been delegated to ADHS. TriCity is clearly the innocent party in this bureaucratic dispute among Medicare administrators, AHCCCS administrators, ADHS and Comcare. Having acknowledged that AHCCCS is required by its State plan to cover these expenses and having acknowledged that ADHS has assumed the contractual responsibility from AHCCCS for these co-insurance and deductibles, the only equitable response would be for AHCCCS to attempt to resolve these claims with Tricity

> rather than to erect procedural hurdles for Tricity to now overcome, particularly when it was AHCCCS that directed Tricity to submit its claims to ComCare in the first place.

Upon Judge Bolton's ruling that she did not have "party jurisdiction" over AHCCCS and ADHS, TriCity filed this underlying grievance against those parties. This litigation requires an understanding of this case history and the roles of ADHS and AHCCCS throughout that history. It also demands a discussion of how and why they are now each of them estopped from denying their liability.

The underlying grievance action, now against AHCCCS and ADHS, was ultimately appealed to Judge Robert D. Myers of Maricopa County Superior Court and on 9/30/2002 he rendered his decision denying the appeal of this second grievance. That decision was appealed to the Court of Appeals and on November 25th that Court returned its decision affirming the decision of Judge Myers. This decision was brought to the Arizona Supreme Court via a Petition for Review . That Petition for Review was denied on April 19, 2004. This Petition for Certiorari ensued.

ARGUMENT AMPLIFYING REASONS FOR ALLOWANCE OF THE WRIT

REASONS FOR GRANTING THIS PETITION

It is respectfully submitted that the United States Supreme Court should grant this petition for the reason that important legal issues have been incorrectly decided. In addition, an important state agency in a state ranked last in the United States as a healthcare provider to the seriously mentally ill population of its state, Arizona, should be equitably estopped from denying its liability for costs covered by the state plan, but not compensated due to its own incorrect written instructions to the provider.

TIME BAR

A bad debt claim must be aged, according to accounting standards, for a lengthy period of time and then followed with "reasonable collection efforts" to qualify it eventually as a bad debt. All claims in this case are bad debt claims. The period of time that billing and collection efforts takes, together with the claims process, exceeds the statutory claims bar period. Federal Medicare rules that adequately "season" the receivables for this purpose, of necessity, as a matter of math, exceed the state's claims bar statute. Applying claims bar statues of this type in a bad debt claim case is a *non sequitur*, if federal medicare standards are to be observed.

COLLATERAL ESTOPPEL

Attached as a convenience is AHCCCS' "Response to December 21, 1999 Minute Entry" as well as it's Notice of Nominal Party Status (Appendix X). AHCCCS, therein served notice that it would "participate in the proceedings only by filing an Answer and certifying the Administrative Record as required by law." In AHCCCS' Response to [Judge Bolton's] December 21, 1999 Minute Entry (A-7) AHCCCS amplifies that position.

Nevertheless, Judge Bolton was eventually required to order AHCCCS to produce intergovernmental agreements. In response, AHCCCS' lawyer wrote on January 12, 2000:

> The record in this matter is voluminous. AHCCCS has not followed the litigation, has not appeared at oral argument, and has not been privy to the exchange of documents and correspondence between ComCare and TriCity. If, as begins to appear, TriCity now wants to argue that AHCCCS, as opposed to ADHS or its contractors, was liable for these claims, it should have done so long ago pursuant to A.A.C. R9-22-804.

Now it appears AHCCCS has argued that resolution of these issues should have proceeded in CV 99-13055, notwithstanding its opposition at the time. At any rate, Judge Bolton concluded that AHCCCS was not a party and that TriCity would have to entertain further proceedings to pursue the agency:

> As a procedural matter, this Court cannot enter an order against AHCCCS for the payment of any specific amount at issue in this case and in that regard the motion to dismiss is granted. ARS Section 12-910 (E) specifies that "the Court may affirm, revise, modify or vacate and remand the agency action". Modification cannot include changing a grievance against ComCare into a judgement against AHCCCS. [Emphasis supplied]

Judge Bolton did conclude that it would have been impossible for the court to determine the issue of AHCCCS' liability for the CIDs. AHCCCS had not been sued as a defendant in that action. TriCity therefore did not litigate this issue in front of Judge Bolton and estoppel does not prevent a finding that AHCCCS is liable for the CIDs now that AHCCCS has been made a defendant.

In order to apply collateral estoppel, there must have been full and fair opportunity to litigate the issue in the first action, *Wetzel v. Arizona State Real Estate Dept.*, 151 Ariz. 330, 333, 727 P.2d 825, 828 (App. 1996). As counsel for AHCCCS pointed out himself there was no record made involving AHCCCS-related issues – such as Branch McNeal's letter. Obviously, Judge Bolton did not believe she had jurisdiction to determine the issue of liability or whether judgement should be entered against AHCCCS, and therefore TriCity did not have a full and fair opportunity to litigate that issue. TriCity cannot be estopped from doing so now.

Judge Bolton would never have entered the final paragraph of her order admonishing AHCCCS for being

"disingenuous" and urging AHCCCS not to erect procedural hurdles for TriCity to overcome in the future unless she knew that TriCity would be pursuing a subsequent action for recovery of the claims. Judge Bolton knew it was not a "dead issue" when she suggested that AHCCCS should not "erect procedural hurdles for TriCity to now overcome." Judge Bolton, as well as all the parties to this claim anticipated further litigation.

THE EQUITABLE ESTOPPEL DOCTRINE APPLIES TO ADHS

The participation of a high officer of ADHS in the incorrect letter of Mr. Branch McNeal (Appendix VIII) is set forth throughout the record of this matter. That officer of ADHS (Mr. Ron Smith) also was in control of ComCare through Governor Symington's extraordinary executive order at the time placing ComCare in receivership. He is copied with Mr. McNeal's letter.

That the advice contained in the letter was incorrect was obvious from a reading of the letter and equally obvious to the writer, who admitted it in his testimony at the underlying hearing. Moreover, Judge Bolton recognized the inconsistency in the final paragraph of her March 13, 2000 order.

Standard for Estoppel Against the State

A party claiming estoppel against the government must show the following three elements: (1) the party to be estopped commits acts inconsistent with the position it later adopts, (2) reliance by the other party, and (3) injury to the latter resulting from the former's repudiation of its prior conduct. *Valencia Energy Co. v. Arizona Dept. of Revenue*, 191 Ariz. 565, 576, 959 P.2d 1256, 1267 (1998). In *Valencia*, the Arizona Supreme Court laid out this analytical framework for an estoppel claim against the government. The Court began with a reminder that prior Arizona case law had denounced the traditional "no estoppel against the sovereign"

rule. *Id.* This more relaxed treatment of governmental estoppel claims is consistent with the modern approach taken in most jurisdictions. *See Freightways v. Arizona Corp. Comm'n*, 129 Ariz. 245, 248, 630 P.2d 541, 544 (1981) and Note, Equitable Estoppel of the Government, 79 Colum. L.Rev. 551, 560 (1978), cited with approval in *State v. Garcia*, 187 Ariz. 527, 931 P.2d 427 (Ct. Appeals, Div 2, 1996).[1] Arizona case law subsequent to the *Valencia* decision confirms this standard and demonstrates that a state entity may be estopped based on essentially the same requirements that would apply to estoppel against any party. *See, e.g., LaPaz County v. Upton*, 299 Ariz. Adv. 39, 986 P.2d 252, 259 (App 1999) (estoppel against the government shown if (1) county's conduct inconsistent with position later adopted, (2) party actually, reasonably, and prospectively relied on county's conduct, and (3) parties sustained injury resulting from county's repudiation of its prior conduct). A governmental entity may be estopped from proceeding further in its course unless such action is "to the detriment of the public interest." *Pingitore v. Town of Cave Creek*, 194 Ariz. 261, 265, 981 P.2d 129, 133 (App. 1998), *rev. denied February 23, 1999*. Even silence or inaction can be a basis for estoppel against the government. *See State v. Garcia*, 187 Ariz. 527, 931 P.2d 427 (1996) at page 430:

> Contrary to appellants' asserting that egregious conduct is required the state may be estopped 'even when the government conduct complained of was in the form of inaction or silence.'" [Omitting citations.]

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1 The decline of the doctrine of "no estoppel against the government" is noted as early as 1976 in 27 A.L.R. Fed 702. As pertains to this case, note Dana Corp. v. U.S., 470 F.2d 1032 (1972): "Some kind of documentation of the misadvice, while not essential if extraneous factors can be shown to establish inferentially that it was given, is desirable . . ."

TriCity has established each of the elements necessary to estop both AHCCCS and ADHS from denying payment for the QMB CID claims based on timeliness.

Here, AHCCCS and ADHS officials repeatedly told TriCity to submit its claims to ComCare, the behavioral health organization under contract with ADHS. Following the reversal in position taken by Medicare concerning these CID'S, the issue of responsibility for bad debt payments was in a state of flux. Meetings were held with federal HCFA and Medicare personnel, representatives of the Medicare intermediary, AHCCCS, and AHCCCS' contractors to determine who was responsible for the CID's. TriCity repeatedly asked AHCCCS what to do and requested the involvement of AHCCCS, ADHS, and ComCare in order to even find an entity to process TriCity's claims. None of these entities would accept the claims for processing. Branch McNeal, a high ranking official of AHCCCS, wrote a May 1998 letter that claimed that AHCCCS and its contractors did not have responsibility for these claims. Mr. McNeal then sent a letter to John Phin of TriCity in December 1998 specifically responding to Dr. Phin's questions about how and where to have these claims processed for payment and the responsibility for the claims. Mr. McNeal's letter, which he wrote in conjunction with Ron Smith of ADHS, clearly directed Dr. Phin to have the claims processed at ComCare and referred him to contact Randy Warren at ComCare and gave him Mr. Warren's address, title and telephone number. In establishing the first element in an estoppel claim, the courts have stated that it generally requires a "considerable degree of formalism," which usually is a written document. *Pingitore*, 194 Ariz. at 265, 981 P.2d at 131. Here, the December 30, 1998 letter was a formal, written document. Dr. Phin had specifically requested that he get this from Mr. McNeal "in writing" and Mr. McNeal testified that he knew it was something that Dr. Phin wanted to rely upon. Mr. McNeal utilized the contributions, review and input from others in AHCCCS as well, although he alone signed the letter on AHCCCS' behalf. The document itself is very

formally written with each of Dr. Phin's questions laid out expressly and then answered one at a time. The letter was written in collaboration with Ron Smith and was copied to him. This letter meets the written document requirement. In addition, the verbal statements made from individuals at AHCCCS and from Ron Smith at ADHS meet this burden. Although they are verbal statements, they were made in a time where the provider was clearly requesting official information on where to submit their claims. Each individual repeatedly told TriCity the same thing: send the claims to ComCare. In conjunction with the written document eventually written in December 1998, these verbal statements are also sufficiently formal to invoke estoppel against AHCCCS and ADHS.

Tricity Reasonably Relied on AHCCCS's and ADHS's Advice

Every officer and key employee of TriCity (including its Director, John Phin and its CFO Ms. Hansen) testified that they placed full reliance on Mr. McNeal's alternative letter.

TriCity was Injured By ADHS' and AHCCCS' Acts

The final element that TriCity must establish is injury resulting from AHCCCS and ADHS' repudiation of their prior conduct. Indisputably, TriCity has suffered injury as a result of relying on the instructions to submit their claims to ComCare. As a result of the protracted grievance and appeal process with ComCare, it is now nearly five years after TriCity initiated the first federal court action to attempt to determine responsibility for these claims. TriCity has not been able to receive the $1,055,374.00 that it is entitled to for these claims. Going back to Medicare is no longer a possibility. These are claims for services provided years ago and the failure to receive reimbursement has had a serious, devastating impact on TriCity's business. If ADHS or AHCCCS had stepped up to the plate sooner and admitted their responsibility for these claims or merely not misled TriCity, then TriCity possibly could have continued operating its non-profit partial hospitalization programs.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted this 17th day of September, 2004.

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